

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

MAR - 7 2008

COURT OF APPEALS
DIVISION TWO

DINORA G.,

Appellant,

v.

ARIZONA DEPARTMENT OF
ECONOMIC SECURITY, SIPRIANO G.,
DINORA G., JESUS G., and GLORIA G.,

Appellees.

2 CA-JV 2007-0062
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil

Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 15547400

Honorable Stephen C. Villarreal, Judge

AFFIRMED

Belinda B. BreMiller

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Dawn R. Williams

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

E C K E R S T R O M, Presiding Judge.

¶1 The juvenile court terminated appellant Dinora G.'s parental rights to four of her children after a jury found the state had proven both alleged statutory grounds for termination and termination was in the children's best interests.¹ Dinora contends on appeal that the court committed various trial errors and argues there was insufficient evidence to support the jury's verdicts. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the termination order. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 13, 53 P.3d 203, 207 (App. 2002). Child Protective Services (CPS) removed the children from their parent's custody in March 2004 after investigating a report it had received about the family. CPS discovered that the family's home was unsafe; they were about to be evicted, and the parents had no plans for alternate housing; the parents failed to take the youngest child, who suffers from myelomeningocele, commonly referred to as spina bifida, to all of her medical appointments; the children were being exposed to domestic violence between the parents; and the father, Armando, was using drugs. Dinora is deaf, only speaks Spanish, and is not a legal United States resident. She had suffered from depression and an untreated pituitary tumor and was entirely dependent on Armando. The Arizona Department of Economic Security (ADES) filed a dependency petition, and the juvenile court adjudicated the children

¹Dinora has seven children. All were found dependent, but only the four youngest children were the subject of this severance proceeding.

dependent after Armando failed to appear at a settlement conference and Dinora admitted allegations contained in an amended petition.

¶3 In September 2005, after reviewing a permanency hearing report, the juvenile court ordered the original case plan of family reunification changed to severance and adoption and ordered ADES to file a motion to terminate the parent-child relationships. ADES filed the motion on September 15, 2005, but moved to withdraw it as to Dinora² in April 2006, after learning the extent of Dinora's hearing and communication impairment and determining that there was "insufficient evidence for the State to prove that CPS [had] made diligent efforts to provide appropriate reunification services" to her.³

¶4 In December 2006, the juvenile court again changed the case plan to severance and adoption, finding that, although Dinora's disability affected her ability to parent the children, her "primary impediment" to parenting was her refusal to separate herself from Armando, who had continued to use illegal substances and had "not successfully participated in services designed to remedy that problem." ADES filed an amended motion to terminate the parent-child relationships, alleging as grounds against Dinora abuse and/or neglect under A.R.S. § 8-533(B)(2) and length of time in care under § 8-533(B)(8)(b).

¶5 A fifteen-day jury trial was held in April and May 2007 as to both parents; however, Armando attended only a portion of the trial, and the juvenile court terminated his

²ADES also moved to withdraw the motion as to Armando.

³Thereafter, the state provided additional reunification services, and Dinora does not contend on appeal that the services were inadequate.

parental rights on the eighth day. As to Dinora, the jury found that ADES had proven both statutory grounds it had alleged in its motion against Dinora and that termination was in the children's best interests. The court terminated Dinora's parental rights to the children based on the jury's findings. Dinora raises ten issues on appeal.

Motion to Bifurcate

¶6 Dinora contends the juvenile court committed "structural error" when it denied her motion to have the allegations against her tried separately from those against Armando. She has, however, cited no authority either supporting her contention she was entitled to a separate trial or that failure to grant that motion resulted in "structural error." Her assertion that the jury may have developed a negative impression of her based on Armando's absence is both speculative and far-fetched. She does not explain what evidence she believes "might" have been excluded in a separate trial, but certainly evidence of Armando's relationship with her and the children as well as his fitness and ability to parent would have been admissible. "[W]hen the State acts to terminate [parental] right[s], it must provide appropriate [and] fair procedures." *Mara M. v. Ariz. Dep't of Econ. Sec.*, 201 Ariz. 503, ¶ 24, 38 P.3d 41, 45 (App. 2002). Because Dinora has shown neither impropriety nor unfairness, we find no error in the juvenile court's denial of separate trials.⁴

⁴Because we find no error, we need not determine whether any alleged error was structural or whether the concept of structural error applies to civil proceedings involving the deprivation of a fundamental right.

Motions in Limine

¶7 Dinora contends the juvenile court erred by denying her motions in limine to preclude testimony about her immigration status and her pituitary tumor, arguing the evidence was irrelevant and unfairly prejudicial. She also argues the court erred by granting ADES's motions to preclude mention of the Americans with Disabilities Act (ADA) and possible alternate plans for the children should Dinora retain her parental rights.

¶8 “A trial court has broad discretion in admitting or excluding evidence, and we will not disturb its decision absent a clear abuse of its discretion and resulting prejudice.” *Lashonda M. v. Ariz. Dep’t of Econ. Sec.*, 210 Ariz. 77, ¶ 19, 107 P.3d 923, 928-29 (App. 2005). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more . . . or less probable.” Ariz. R. Evid. 401. Relevant evidence is generally admissible, but it “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Ariz. R. Evid. 403; *see also* Ariz. R. Evid. 402. “Evidence is unfairly prejudicial only if it has an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy, or horror.” *State v. Gulbrandson*, 184 Ariz. 46, 61, 184 P.2d 579, 594 (1995). “Because ‘[t]he trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice,’ the trial court has broad discretion in this decision.” *State v. Connor*, 215 Ariz. 553, ¶ 39,

161 P.3d 596, 607 (App. 2007), *quoting State v. Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d 513, 518 (App. 1998) (alteration in *Connor*).

¶9 Dinora first argues the juvenile court improperly allowed evidence of her immigration status. The state may not terminate parental rights based on a parent's immigration status because that status itself has no direct relevance to the fitness of a person to parent his or her children. *See Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, ¶ 40, 152 P.3d 1209, 1216 (App. 2007) (parent's "illegal status" not basis for terminating parental rights but "may cause or contribute to the existence of such a basis"). We would not hesitate to reverse the termination of Dinora's parental rights had that occurred.

¶10 But in this case, Dinora's immigration status was relevant to the state's ability to provide reunification services to her and to her interaction with and dependence on Armando. For example, a family support specialist testified the Community Outreach Program for the Deaf was unable to help Dinora obtain employment because her immigration status did not allow her to be lawfully employed. Dinora herself acknowledged she would not be able to work until she gained legal immigration status, and she testified it would be "hard" for her to feed the children without Armando's financial support. Dinora also testified that at times she was scared that Armando would "take [her] to Immigration."

¶11 There is no suggestion in the record that admission of this relevant evidence caused or was likely to cause undue prejudice to Dinora. As she has pointed out, evidence was presented to the jury that Dinora had applied for legal residency and could not be deported at the time of trial. Moreover, the juvenile court had screened the jurors for

potential bias against illegal residents during voir dire. Given the sensitivity with which the juvenile court approached the issue, it did not abuse its discretion by permitting ADES to introduce evidence of Dinora's immigration status to the extent it was factually relevant to the bases for terminating her parental rights.

¶12 Dinora also contends that evidence of her pituitary tumor was irrelevant because she no longer had the tumor at the time of trial. But evidence about her tumor was relevant to CPS's removal of the children from her care and to explain elements of CPS's case plans. Dinora had reported to a CPS investigator that she had been afraid to undergo recommended surgery for the tumor and that it had caused her severe headaches, which made her "want[] to die." In its initial case plan, CPS had included obtaining medical treatment for the tumor among the tasks Dinora had to accomplish.

¶13 Dinora next argues the evidence was prejudicial because it allowed ADES to "suggest [Dinora's] purposeful non-resolution of a medical issue." But ADES had eliminated from its case plan the requirement that Dinora seek medical treatment for the tumor after the tumor had apparently resolved itself. And, Dinora's expert testified, without opposition, that surgical intervention had actually been contraindicated. The juvenile court did not err by admitting evidence of the tumor, and Dinora suffered no prejudice.

¶14 Dinora further claims the juvenile court committed prejudicial and structural error by precluding evidence about or mention of the ADA. Again, however, she fails to cite any authority for her structural error argument, and she has not shown how she was prejudiced by the court's ruling. Dinora argues that "[i]n order for her to comprehend the

services that CPS and the Court w[ere] providing to her she needed to be accommodated under the ADA as such and she was not.” But whether the ADA applies to dependency and termination proceedings is a legal issue the court’s evidentiary ruling could not affect. The question before the jury was whether CPS had “made a diligent effort to provide [Dinora with] appropriate reunification services.” § 8-533(B)(8). The court’s ruling did not prevent her from arguing and introducing evidence that the services CPS had provided were inappropriate, given her disability.

¶15 Dinora also argues that “much of her defense to allegations that she was unable to care for the children rested on the fact that medical professionals and other service providers [were] required to provide her with appropriate interpretation services”; that the court’s ruling prevented her from “introducing accurate evidence about her everyday functioning”; and because witnesses were prohibited from testifying about the legal requirements of the ADA, the jury was “left . . . with an impression about [her] parenting which was extremely negative.” Again, however, the legal obligations of the relevant service providers, which Dinora does not identify, was not a question before the jury. Dinora was not prohibited from introducing evidence that service providers did, in fact, provide her with interpretation services. And any marginal relevance their legal obligation to do so had to the case was outweighed by the danger of confusing the issues before the jury. *See Ariz. R. Evid.* 403. We find no error in the court’s granting ADES’s motion.

¶16 Nor did the court err in precluding her from introducing evidence of possible alternate plans for the children should Dinora retain her parental rights. Dinora had argued

she should be allowed to inform the jury that, if her rights were not terminated, the children would not automatically be returned to her so that the jury would not be presented with what she called a “Hobson’s choice” of either terminating her rights or allowing the children to be returned to her before she was ready to care for them. The court deemed her concern “reasonable” and ruled she was allowed to so inform the jury either by argument or evidence. The court also instructed the jury to determine if Dinora would be capable of caring for the children “in the near future,” not immediately. Thus, any truth to Dinora’s speculation that the jury was “left . . . presuming that if they did not sever the mother’s rights she would be picking them up after the trial” was not the result of the juvenile court’s ruling on this issue. Rather, it was the result of Dinora’s own failure to introduce evidence or point this out to the jury during closing argument.

Motions for Mistrial

¶17 Dinora argues the juvenile court erred by denying motions for mistrial she made after a CPS caseworker and the court appointed special advocate allegedly testified in violation of the court’s pretrial orders. Pursuant to motions in limine, the juvenile court had precluded mention of: (1) “the order directing the State to file a motion to terminate” and (2) “prior determinations of the Court concerning findings of reasonable efforts on the part of [A]DES.” It had also prohibited the special advocate from testifying about the “ultimate issue” of whether termination was in the children’s best interests. Dinora moved for a mistrial after a caseworker testified generally about preliminary protective hearing conferences and Dinora’s and Armando’s invocation of their right to a preliminary protective

hearing. Dinora also moved for a mistrial when the special advocate testified she had opposed the children's participation in an in-home counseling program because she did not believe their participation was in the children's best interests. The court denied Dinora's motions, finding that the witnesses' testimony had not violated its orders.

¶18 “We review a trial court's denial of a motion for mistrial for an abuse of discretion, bearing in mind that a mistrial is a ‘most dramatic’ remedy that ‘should be granted only when it appears that that is the only remedy to ensure justice is done.’” *State v. Blackman*, 201 Ariz. 527, ¶ 41, 38 P.3d 1192, 1203 (App. 2002), *quoting State v. Maximo*, 170 Ariz. 94, 98-99, 821 P.2d 1379, 1383-84 (App. 1991). The testimony in question here arguably, but not necessarily, fell within the scope of the court's orders. Because the juvenile court was in the best position to determine the intended scope of its own orders, it did not abuse its discretion by denying Dinora's motions for mistrial.

Sufficiency of the Evidence

¶19 Dinora argues the evidence was insufficient to support the jury's verdicts regarding both statutory grounds for severance and the finding that termination of Dinora's rights was in the best interests of the children. In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to upholding the jury's factual findings. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000). We do not reweigh the evidence, but determine only whether any reasonable evidence supports the verdicts. *See id.* Statutory grounds for severance of a parent's rights must be established by clear and convincing evidence. A.R.S. § 8-537(B);

Mary Ellen C. v. Ariz. Dep't of Econ Sec., 193 Ariz. 185, ¶ 25, 971 P.2d 1046, 1051 (App. 1999). That termination of a parent's rights is in the children's best interests must be established by a preponderance of the evidence. *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005); *see* § 8-533(B).

¶20 Because we find sufficient evidence to support the jury's verdict under § 8-533(B)(8)(b), we need not address Dinora's arguments under § 8-533(B)(2).⁵ *See In re Maricopa County Juv. Action No. JS-501568*, 177 Ariz. 571, 579, 869 P.2d 1224, 1232 (App. 1994) (we will affirm severance order if sufficient evidence supports best interests determination and any one of the statutory grounds found for severance). Dinora does not contest the sufficiency of the evidence to establish that the children had been in court-ordered, out-of-home placements for a cumulative period of fifteen months or longer or that ADES had made diligent efforts to provide her with appropriate reunification services. *See* § 8-533(B)(8)(b). She suggests only that there was insufficient evidence to establish she had "been unable to remedy the circumstances" that caused the children to be in out-of-home placements or that she was unlikely to "be capable of exercising proper and effective parental care and control in the near future." *Id.* Her argument, in its entirety is as follows:

As to the case plan tasks, she had performed her case plan and had overcome hurdles to do so, to the point that Dr. Martinez [a psychologist] did not see any psychological reason that she could not parent. She had a legal source of income through the support of her sister; she had a home that [a CPS case manager]

⁵We also need not address her argument that the juvenile court incorrectly instructed the jury regarding this ground for termination.

testified would be appropriate for the children; she had filed a restraining order against her drug-using husband; and she was protected from deportation.

Dinora's therapist testified however that, although Dinora "ha[d] made a lot of improvements" and had gained some independence, she was still "enmeshed" with Armando and likely would "reunite" with him. Armando testified that he and Dinora were living together at the time of trial. A CPS caseworker testified that Dinora had not benefitted from reunification services and opined that the children could not be safely returned to her. And another of Dinora's therapists testified that, even without Armando, Dinora would not be able to parent for another five years. As noted above, we must view the evidence in the light most favorable to sustaining the termination order. Because there was reasonable evidence supporting the jury's verdict, there was sufficient evidence supporting the juvenile court's termination of Dinora's parental rights pursuant to § 8-533(B)(8)(b).

¶21 Challenging the jury's findings that termination of her parental rights was in the best interests of the children, Dinora first contends Rule 66(C), Ariz. R. P. Juv. Ct., required the jury to make that determination under the standard of clear and convincing evidence. The Arizona Supreme Court, however, has found that "Arizona's statutes require that the party seeking termination of parental rights establish only the statutory grounds of section 8-533 by clear and convincing evidence and establish the best interests of the child by a preponderance of the evidence." *Kent K.*, 210 Ariz. 279, ¶ 22, 110 P.3d at 1018. We are bound by that decision. *See City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993) (court of appeals bound by controlling decisions of

Arizona Supreme Court). Therefore, the requirement in Rule 66(C) that “allegations” in a severance motion be proven by clear and convincing evidence applies only to the statutory grounds for termination. *Cf. Kent K.*, 210 Ariz. 279, ¶ 16, 110 P.3d at 1017 (interpreting phrase “grounds for termination” in § 8-537 to mean only statutory grounds, not best interests).

¶22 Dinora also argues that ADES “did not present any evidence that suggested the children’s best interests would be served by terminating [Dinora’s] rights.” “To establish that terminating [Dinora’s] parental rights was in the children’s best interests, ADES was required to show that the [children] would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship.” *Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d 943, 945 (App. 2004), *citing Jennifer B. v. Ariz. Dep’t of Econ. Sec.*, 189 Ariz. 553, 557, 944 P.2d 68, 72 (App. 1997). “The existence of a current adoptive plan is one well-recognized example of . . . a benefit” to children, *Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d at 945, and even without a firm adoption plan, severance benefits adoptable children “because the children then would be legally free to be adopted,” *In re Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 352, 884 P.2d 234, 238 (App. 1994); *see James S. v. Ariz. Dep’t of Econ. Sec.*, 193 Ariz. 351, 356, 972 P.2d 684, 689 (App. 1998). The children’s therapist testified that the children wanted a permanent placement, would not be safe with Dinora, and “ha[d] no interest” in returning to her. The special advocate testified that the children were “very adoptable.” At the time of trial, the youngest child, who has special needs, was living in a potentially adoptive placement. And

CPS's adoption oversight supervisor testified that severance would "vast[ly]" improve ADES's ability to locate adoptive placements. We conclude sufficient evidence supported the jury's findings regarding the children's best interests.

¶23 The juvenile court's order terminating Dinora's parental rights after a jury trial is affirmed.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge